INDEX.

Cases Cited.

Texts and Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1195.

WILLIAM JOE JOHNSON,
Petitioner,

v.

HARRY S. AVERY, Commissioner, Department of Corrections,
and
LAKE F. RUSSELL, Warden, Tennessee State Penitentiary,
Nashville, Tennessee,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit.

BRIEF FOR THE RESPONDENTS.

QUESTIONS PRESENTED.

Whether 28 U. S. C., § 2242 authorizes the petitioner to prepare habeas corpus petitions for other penitentiary inmates.

Whether a prison regulation prohibiting penitentiary inmates from preparing petitions for writs of habeas corpus for other inmates denies or unduly restricts reasonable access to the courts.

ARGUMENT.

I.

Neither the Language Nor the Policy of 28 U. S. C., § 2242 Authorizes the Petitioner to Prepare Habeas Corpus Applications for Other Inmates.

In **Gusman v. Marrero**, 180 U. S. 81 (1901), this Court held that a private citizen may not maintain a suit to compel the release of another regardless of his friendship and sympathy with the person detained or of his concern that unconstitutional laws might be enforced. Early decisional law, however, permitted one person to sign and verify petitions on behalf of another in certain instances where the party in interest lacked physical access to the courts and where the third-party applicant demonstrated a sufficient interest in the proceeding. Thus, an attorney was permitted to verify a habeas petition in a deportation case. **United States ex rel. Funaro v. Watchorn**, 164 Fed. 152 (C. C. S. D. N. Y. 1908):

> "[I]t has been the frequent practice in this district to present habeas corpus petitions in deportation cases signed and verified by others than the person detained. In such cases, often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained . . ." 164 Fed. at 153.

Relatives, parents and guardians having a superior right to the custody and control of a person illegally detained have been permitted to make an application on behalf of members of the Armed Forces. **Ex Parte Dostal**, 243 Fed. 664 (D. C. N. D. Ohio 1917). This practice was limited somewhat by the decision of **United States ex rel. Bryant v. Houston**, 273 Fed. 915 (2nd Cir. 1921), requiring that a "next friend" application set forth some reason or explanation, satisfactory to the court, why the complaint is not signed and verified by the person detained and fur-

ther that a sufficient relationship be shown between the parties. It has also been held that a petition may be signed and verified by a person authorized to act on behalf of another who is in peril of being removed from the jurisdiction of the court before he can act in person. **Collins v. Traeger**, 27 F. 2d 842 (9th Cir. 1928).

Section 2242 of the Judicial Code was amended in 1948 to follow the actual practice of the courts:

> "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended **or by someone acting in his behalf.**"

Therefore, in **Nash v. MacArthur**, 184 F. 2d 606 (D. C. Cir. 1950), **cert. denied** 342 U. S. 838 (1951), an attorney was permitted to sign and verify a petition filed on behalf of certain Japanese nationals. However, in **Wilson v. Dixon**, 256 F. 2d 536 (9th Cir. 1958), the Court held that the latter phrase did not abolish the requirements that a satisfactory reason or explanation be given why the detained person did not sign and verify the complaint and that a showing be made as to the relationship between the "next friend" and person detained. Also see the connected case of **Wilson v. Dixon**, 251 F. 2d 338 (9th Cir. 1958), **cert. denied** 358 U. S. 856 (1958).

The District Court, relying on the 1948 amendment, held that § 2242 created a federally-protected right in the petitioner to prepare habeas applications for fellow inmates. The Court of Appeals found to the contrary:

> "The provision of the law authorizing someone to act on behalf of a prisoner whose release is sought, relates only to the act of signing or verifying the petition, and we do not interpret that authorization to include the preparing of legal papers and serving as an attorney in violation of state law. In addition, the inability or incompetency to which this section is

addressed is not the inability to draft legal papers as the District Court seems to hold. Most laymen lack that ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers. It seems clear that the situation to which this provision was meant to apply, is one where physical or mental handicaps prevent the prisoner from personally signing or verifying the petition, not one wherein lack of intelligence or legal training keep him from drafting his own papers."

The District Court's construction of § 2242 and more particularly the amendment thereto is at best tenuous. The statute in question deals with the sufficiency of habeas applications and in certain instances permits third parties to sign and verify petitions on behalf of another for good cause shown. The provisions of § 2242 are procedural rather than substantive and it is respectfully submitted that this statute cannot properly be construed as conferring a federally-protected right in the petitioner to prepare habeas applications on behalf of other inmates of the Tennessee State Penitentiary. This section of the Judicial Code would further appear to be inapplicable to the case at bar since the petitions prepared by Johnson are actually signed and verified by the person or persons on whose behalf they are filed.

II.

A Prison Regulation Which Forbids Penitentiary Inmates From Preparing Petitions for Writs of Habeas Corpus for Other Inmates Neither Denies Nor Unduly Restricts Reasonable Access to the Courts.

A denial of or undue restraint on reasonable access to the courts violates the due process and equal protection clauses of the Constitution. Ex Parte Hull, 312 U. S. 546 (1941); Cochran v. Kansas, 316 U. S. 255 (1942) and

Dowd v. United States, 340 U. S. 206 (1951). It is upon this premise that the petitioner's position must be bottomed.

The instant case presents a somewhat different twist in that the petitioner does not contend that he himself has been denied reasonable access to the courts but rather insists that other inmates are denied access when he (petitioner) is prohibited from preparing petitions in their behalf. As a matter of fact, the petitioner has filed numerous petitions on his own behalf. See e. g. **In Re Johnson**, 277 F. Supp. 267 (D. C. E. D., Tenn. 1967), and **State ex rel. Johnson v. Heer**, 219 Tenn. 604, 412 S. W. 2d 218 (1966).

The State of Tennessee has attempted to provide penitentiary inmates with an effective, uncomplicated and expeditious procedure within which to challenge the constitutionality of criminal convictions. These provisions are codified in Tenn. Code Ann., §§ 40-3801 through 3824. Tennessee's Post-Conviction Procedure Act is set forth in its entirety in the Appendix to the Brief. Under this Act, all that is required is a simple statement of fact alleging a deprivation of a constitutional right. Legal citations are neither required or desired. Allegations contained in petitions filed by penitentiary inmates are liberally construed and are viewed in a light most favorable to the petitioner. Wide leeway is given within which to amend and in many cases, appointed counsel will amend the petitions after consultation with the petitioner.

> "40-3807. **Amendment of petitions not in prescribed form.**—No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition.
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> * * * * * * *

"40-3815. **Dismissal, withdrawal or amendment of Petitions.**—The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney-general shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, **with aid of counsel**, to file amendments.

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"40-3821. **Determination of indigency—Appointment of counsel and court reporters.**—Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014—40-2043."

Habeas applications are accorded similar treatment when filed in the Federal Courts. **Price v. Johnston**, 334 U. S. 266 (1948); **Gibbs v. Burke**, 337 U. S. 773 (1949); **Darr v. Burford**, 339 U. S. 200 (1950), and **Sanders v. United States**, 373 U. S. 1 (1963).

Access to the courts has been defined to mean "the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." **Hatfield v. Bailleaux**, 290 F. 2d 632, 637 (9th Cir. 1961), **cert. denied**, 368 U. S. 862 (1961). Another definition has been extended to include "not only the right to place a petition for relief in the mails . . . but also

the right to possess in his cell the legal materials which the inmate desires to include in such a document while they are being collated into mailable form." **In Re Schoengarth**, 57 Cal. Rptr. 600, 425 P. 2d 200, 207 (1967).

That penitentiary inmates are afforded reasonable access to the courts in Tennessee is beyond peradventure. This is certainly true within the historical understanding of that phrase. There of course is a distinction between access to the courts and a means to effect a remedy. **Roberts v. Peppersack**, 256 F. Supp. 415, 433 (D. C., Md. 1966), **cert. denied**, 389 U. S. 877 (1967). Prison rules and regulations governing the latter have been consistently upheld. **Hatfield v. Bailleaux**, *supra*; **Lee v. Tahash**, 352 F. 2d 970 (8th Cir. 1965); **Walker v. Pate**, 356 F. 2d 502 (7th Cir. 1966); **Vida v. Cage**, 385 F. 2d 408 (6th Cir. 1967); **United States v. Myers**, 244 F. Supp. 826 (D. C. E. D., Penn. 1965); **United States ex rel. Wakeley v. Pennsylvania**, 247 F. Supp. 7 (D. C. E. D., Penn. 1965), and **Roberts v. Peppersack**, *supra*.

State officials have been authorized to adopt, promulgate and enforce rules and regulations with reference to the internal management and discipline of prison inmates. The courts traditionally have expressed a reluctance to interfere with prison administration unless it can be clearly demonstrated that certain rules or regulations violate fundamental Constitutional rights. **Childs v. Pegelow**, 321 F. 2d 487 (4th Cir. 1963), **cert. denied**, 376 U. S. 932 (1964); **Sostre v. McGinnis**, 334 F. 2d 906 (2nd Cir. 1964); **cert. denied**, 379 U. S. 892 (1964); **United States v. Marchese**, 341 F. 2d 782 (9th Cir. 1965), **cert. denied**, 382 U. S. 817 (1965); **Landman v. Peyton**, 370 F. 2d 135 (4th Cir. 1966), **cert. denied**, 388 U. S. 920 (1967).

The activity of the petitioner within the confines of the State penitentiary unquestionably presents substantial disciplinary problems. The presence and curtailment of inmate "writ-writers" is not unique in Tennessee. See

e. g., **DeWitt v. Pail**, 366 F. 2d 682 (9th Cir. 1966), and **Austin v. Harris**, 226 F. Supp. 304 (D. C. W. D., Mo. 1964). In the last analysis, it is the "inmate-client" himself who will inevitably suffer the most from the practice of "jailhouse lawyers". Numerous petitions prepared by the petitioner are in the record before the Court. Petitioner raises substantially the same grounds in every petition. See **State ex rel. Callahan v. Henderson**, ... Tenn. ..., 417 S. W. 2d 789 (1967). In many instances, the "inmate-client" will have little knowledge or comprehension of the factual averments contained in the petition prepared in his behalf. It is not inconceivable that possible meritorious claims may be overlooked entirely or subjected to inadequate factual development due to the standardized potpourri of spurious allegations inserted in every petition prepared by the petitioner. Some institutions have established "writ rooms" in an attempt to eliminate the influence of "jailhouse lawyers". It has been noted that such rooms are "probably more of a blessing than a curse". **Ex Parte Wilson**, 235 F. Supp. 988 (D. C. E. D. S. C. 1964). Also see the connected case of **Ex Parte Wilson**, 242 F. Supp. 537 (D. C. E. D. S. C. 1965). It is lack of legal knowledge rather than illiteracy which encourages fellow inmates to seek the services of the petitioner. For some time, the petitioner has held himself out as having a superior skill and knowledge in this field, an illusion unfortunately shared by many in the prison population. The Court below correctly recognized that "no favor is granted to the other prisoners by allowing the representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the law." 382 F. 2d at 357.

The petitioner is engaged in the practice of law under any definition. See e. g. T. C. A., § 29-302. He is neither assisting (in the true sense of that word) nor is he acting merely in a clerical capacity. It is clear from the record

that the petitioner, alleging substantially the same constitutional violations, drafts these petitions from beginning to end. "Obviously the right to practice law or to maintain a law department within the confines of a state penitentiary is not a right secured by the Constitution of the United States." **Siegel v. Ragen**, 180 F. 2d 785 (7th Cir. 1950), **cert. denied** 339 U. S. 990 (1950). In this regard, the Court below held as follows:

> "In essence, then, the ruling of the District Court allows petitioner to engage in activity in the state prison which would constitute a crime if conducted outside the penitentiary . . .
>
> "The main thrust of the District Court's opinion on this issue was that petitioner's services are needed to make other prisoners' rights to habeas corpus effective in light of their own limited abilities. We believe that on closer analysis this right to effective post-conviction procedures does not warrant so drastic a limitation on the power of the state to regulate discipline in its penal institutions and to control the practice of law within its borders." 382 F. 2d at 356.

The distinction between obstructing access to the courts and prohibiting one prisoner from drafting legal papers for another was considered in **Brabson v. Wilkins**, 19 N. Y. 2d 433, 227 N. E. 2d 383 (1967):

> "There is an essential difference between obstructing a prisoner's access to a court in his own right and a rule stopping him from drawing up legal papers for other prisoners. No prisoner has a constitutional right to draw legal papers for other people. It is not possible to deduce such a right from anything said or decided in Ex Parte Hull . . ." 227 N. E. 2d at 384.

The **Brabson** decision was cited with approval in **Owens v. Russell**, 277 F. Supp. 390 (D. C. M. D. Penn. 1967):

> "Owens is not being denied access to the courts by a rule prohibiting another inmate with more legal

ability from drawing his petition for him. All that is required in a habeas corpus petition is a statement of the facts on which the petitioner bases his claim that he is being held illegally." 277 F. Supp. at 391.

Respondents respectfully submit that the Court below properly concluded that:

> "The problem of providing effective access to legal assistance at all stages of criminal justice, from pretrial to post-conviction, certainly deserves the concern which the District Court showed in this case. However, its solution is more likely to be assured if it is attended to by the bench, bar, and law schools rather than left to the *ad hoc* procedures sanctioned in the District Court." 382 F. 2d at 357.

CONCLUSION.

The petitioner clearly has not been denied access to the courts. Submitted, neither have the other inmates of the Tennessee State Penitentiary. Although the petitioner's motive in this regard is immaterial, it would be unrealistic to consider same entirely altruistic. It is true that some prisoners may have more ability than others. This fact, however, does not justify the activity of the petitioner within the confines of the State Penitentiary. Should a prisoner overlook a ground for relief in one petition, he may, of course, file another. There is absolutely no reason to believe that prison officials would fail to notify the court should an inmate advise them of a complete inability, either mental or physical, to prepare a habeas application on his own behalf. Prisoners do not seek the services of the petitioner due to illiteracy but rather state that they lack the necessary "legal knowledge". Tennessee provides penitentiary inmates with a fair and simple procedure within which to challenge the constitutionality of criminal convictions. Once a petition is filed, counsel is appointed almost as a matter of course.

Although the regulation in question was undoubtedly adopted as a disciplinary measure, it will inevitably be the "inmate client" who suffers the most from this practice. Surely, little benefit results from the filing of substantially identical petitions on behalf of numerous inmates. There is an essential difference between obstructing a prisoner's access to the courts and a regulation prohibiting the petitioner from drafting legal papers for others. It is therefore respectfully submitted that neither the intent nor the effect of the regulation in question denies or restricts access to the courts.

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